Supreme Court, U.S.
FILED
MAY 16 1997
CLERK

No. 96-1644

In The

Supreme Court of the United States

October Term, 1996

CHRISTINE V. GREEN,

Petitioner,

vs.

UKEME UMANA, M.D.,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

Petitioner (Plaintiff Below):

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Respondent (Defendant Below):

Ukeme Umana, M.D.
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Respondent, Ukeme Umana, M.D. and The Carbondale Eye Clinic (Clinic) submits this Brief in Opposition to Petitioner's Petition for a Writ of Certiorari filed herein by Christine V. Green. Respondent respectfully submits that this Court should deny the Petition to review the Opinion of the Illinois Appellate Court for the Fifth District (published in the Official Advance Reports, Advance Sheet No. 15, July 20, 1994) and subsequent denial of Petition for Leave to Appeal submitted to the Supreme Court of Illinois in this case.

SUMMARY OF ARGUMENT

Petitioner claims that the Illinois Code of Civil Procedure, Section 5/2-622 is unconstitutional in that it:

(a) restricts her right of free access to the court, as guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution;

(b) impinges on her right to petition the nation's courts as guaranteed by the First Amendment of the United States Constitution;

(c) violates her due process rights by denying her a meaningful opportunity to have her allegations heard; and

(d) violates her right to equal protection by imposing a burdensome requirement in the form of a certificate of merit at the time that her Complaint was filed against the Respondent.

The Supreme Court of Illinois has specifically addressed and rejects these very propositions in *Deluna v. St. Elizabeth's Hospital,* 147 Ill. 2d 57, 588 N.E. 2d 1139 (1992). This is the sole reason that Petitioner's Petition for Leave to Appeal to the Supreme Court of Illinois was denied. The Supreme Court of

Illinois addressed each constitutional attack of Petitioner, and held Section 5/2-622 to be constitutional. *See Deluna v. St. Elizabeth's Hospital; McAlister v. Schick,* 147 Ill. 2d 84, 588 N.E. 2d 1151 (1992).

STATEMENT OF THE CASE

The Petitioner, Christine V. Green, filed her first Complaint claiming actions of medical negligence against the Respondent, Ukeme Umana, M.D. and the Carbondale Eye Clinic (Clinic) on March 10, 1994. Petitioner failed to attach the requisite Affidavit pursuant to Section 5/2-622 of the Illinois Code of Civil Procedure, which provides that the Petitioner must attach to her Complaint an Affidavit stating that a knowledgeable physician has determined that there is a reasonable and meritorious cause of action. Petitioner did file an Affidavit, but it merely alleged that Petitioner "had been unable to secure an attorney to represent me . . ." On April 18, 1994, Respondent filed a Motion to Dismiss with supporting Memorandum of Law pursuant to Sections 5/2-622 and 5/2-619 of the Illinois Code of Civil Procedure, alleging that failure of Petitioner to file and attach an adequate Affidavit under Section 5/2-622. On April 28, 1994, Petitioner filed a Motion for a 90 Day Extension and a Reply to Respondent's Motion to Dismiss.

On May 6, 1994, the trial court found Petitioner's Complaint to be insufficient in that her Affidavit was "wholly insufficient to comply with 735 ILCS 5/2-622" and found that Petitioner's allegations concerning the unconstitutionality of same had previously been resolved and decided in *Deluna v. St. Elizabeth's Hospital.* In the trial court's holding, it struck Petitioner's Complaint and granted her 30 days to file an Amended Complaint.

Petitioner did not file an Amended Complaint within the

thirty (30) days. On June 8, 1994, Petitioner filed a Motion for Extension of Time to File Supplemental Health Professional's Report. On June 21, 1994, the trial court granted Petitioner 30 days to file said report. The report was never filed.

On August 5, 1994, the trial court entered its Order finding that the Petitioner "has filed neither an Amended Complaint nor a Supplemental Health Professional's Report" and dismissed the case for want of prosecution subject to being reopened within 30 days upon a showing that the Petitioner's failure was for justifiable reason, and required that the Petitioner provide the court with legal authority to aid in explanation for such late filing.

Petitioner filed her Notice of Appeal on September 2, 1994, completely disregarding the trial court's Order. Respondent filed a Motion to Dismiss with attached Memorandum of Law as the trial court's Order was not a final appealable Order, and same was granted by the Fifth District Appellate Court of Illinois on October 24, 1994. The mandate was issued on November 23, 1994. The trial court dismissed the Petitioner's Complaint for want of prosecution on January 9, 1995 after a formal Motion to Dismiss was filed by the Respondent.

Petitioner filed her Complaint once again, on August 3, 1995, with identical allegations of medical negligence on the part of Dr. Ukeme Umana, M.D. The only substantial change amounted to adding the Carbondale Eye Clinic (Clinic) as an additional Defendant, although no allegations were directed to the Clinic and no relief was requested from same. The Petitioner did not attach an Affidavit pursuant to the Illinois Code of Civil Procedure, Section 5/2-622. On August 28, 1995, once again, the Respondent filed a Motion to Dismiss and attached Memorandum of Law Pursuant to Section 5/2-619 and 5/2-622, setting forth the background of the previous lawsuit along with

relevant case law in support thereof. Said Motion prayed that the trial court dismiss the Petitioner's Complaint with prejudice pursuant to the Illinois Code of Civil Procedure for her refusal to file the required health professional's report or to allege specific reasons for same, pursuant to Section 5/2-622(a)(2). In the alternative, the Respondent prayed that Petitioner be required to file said report within ninety (90) days.

On September 11, 1995, Petitioner filed a response with the trial court alleging that she had "submitted information regarding her claim to a physician in the area of Baltimore, Maryland and needed additional time to determine if the Certificate required is obtainable", and reiterated her belief that Section 5/2-622 of the Illinois Code of Civil Procedure was unconstitutional. Petitioner also filed a Motion for Extension of Time for an additional ninety (90) days. On September 19, 1995 the trial court dismissed the Petitioner's Complaint involuntarily, with prejudice, pursuant to Section 5/2-622.

The Illinois Appellate Court for the Fifth District affirmed the trial court's decision and held that the Supreme Court of Illinois' decision in *DeLuna v. St. Elizabeth's Hospital,* 147 Ill. 2d 57, 588 N.E. 2d 1139 (1992) governed all constitutional issues raised by the Petitioner herein. The Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal on these issues.

REASONS FOR DENYING THE WRIT

I.

SECTION 5/2-622 OF THE ILLINOIS CODE OF CIVIL PROCEDURE, WHICH REQUIRES THE FILING OF A HEALTH PROFESSIONAL'S WRITTEN REPORT IN A MEDICAL MALPRACTICE CASE IS CONSTITUTIONAL.

Petitioner claims that the Illinois Code of Civil Procedure, Section 5/2-622 is invasive of the United States Constitution, specifically the First, Fifth and Fourteenth Amendments contained therein, in that it:

a. Impermissibly restricts her right of free access to the courts;

b. Impermissibly impinges in her right to petition the nation's courts;

c. Denies her a meaningful opportunity to be heard, in violation of her Due Process rights; and

d. Denies her right to equal protection by imposing a burdensome requirement on medical malpractice plaintiffs.

Each of these contentions were specifically addressed by the Supreme Court of Illinois in *Deluna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 588 N.E. 2d 1139 (1992), reexamined by same in *McAlister v. Schick*, 147 Ill. 2d 84, 588 N.E. 2d 1151 (1992) and *Miller v. Gupta*, 174 Ill. 2d 120, 672 N.E. 2d 1229 (1996) and reaffirmed as recently as February 4, 1997, wherein the Appellate Court for the First Judicial Circuit of Illinois specifically addressed the constitutionality of Section 5/2-622 in *Calamari v. Drammis*, 1997 WL 43134 (4th Dist. 1997).

As in each of the aforementioned cases, Petitioner's contentions involve the alleged unconstitutionality of Section 5/2-622 of the Illinois Code of Civil Procedure. Said statutory provision is applicable to "any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice." 735 ILCS 5/2-622(a) (West 1992). To conform with Section 5/2-622, the plaintiff must attach to the complaint an affidavit certifying that she has consulted and reviewed the facts of the case with a health professional, who has determined in a written report that there is "a reasonable and meritorious cause" for filing the action. 735 ILCS 5/2-622(a)(1) (West 1992). Failure to file same, "shall be grounds for dismissal under Section 5/2-619." 735 ILCS 5/2-622(g) (West 1992).

At the onset, it must be recognized that there is a strong presumption that legislative enactments are deemed constitutional. *See Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E. 2d 763 (1986). Further, courts have a duty to sustain legislation whenever possible and to resolve all doubts in favor of constitutional validity. *Agran v. Checker Taxi Co.*, 412 Ill. 145, 105 N.E. 2d 713 (1952).

A. Section 2-622 Does Not Deny Litigants Access to the Court System.

Along with the United States Constitution, Article I, section 12 of the Illinois Constitution also entitles individuals to seek remedy in the laws for all "injuries and wrongs which he receives to his person, privacy, property or reputation." Ill. Const. 1970, art. I, sec. 12. The Supreme Court of Illinois has interpreted this provision as "an expression of a philosophy and not a mandate that a certain remedy be provided in any specific form or that the nature of the proof necessary to the award of a judgment or decree continue without modification." *Sullivan v.*

Midlothian Park Dist., 51 Ill. 2d 274, 281 N.E. 2d 659 (1972). This view continues to prevail in Illinois. As long as consistency is maintained regarding separation of powers, the legislature may impose reasonable conditions and limitations on the judicial branch to define and clarify access to the court system. *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill. 2d 373, 483 N.E. 2d 1271 (1985).

Section 2-622 simply requires a plaintiff to obtain, prior to trial, a certificate from a health care professional, stating that the claim has a factual and meritorious claim. As the Supreme Court of Illinois held in *Deluna*, said requirement is merely a parallel requirement for the forthcoming trial, wherein plaintiff must present expert testimony to demonstrate the applicable standard of care and the defendant's breach. *Deluna*, 147 Ill. 2d at 63.

As per the rational basis standard, Section 2-622 is primarily intended to eliminate frivolous suits, and it imposes no greater duty on healing art malpractice litigants than that required at the time of trial on the merits. *Id. at 64.*

B. Section 2-622 Does Not Violate the Equal Protection Clause Nor the Due Process Clause of the United States Constitution.

Section 2-622 does not "implicate a suspect or quasi-suspect classification". Therefore, the appropriate standard for determining if the Petitioner herein has an equal protection challenge is by utilizing the Rational Basis Test. (*See* Respondent' Argument, Section II). *See also McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969).

In addition, Section 2-622 does not burden a fundamental

right, and for the purposes of the Petitioner's Petition for Writ of Certiorari, the appropriate inquiry under the due process challenge is also whether the legislation bears a rational relationship to a legitimate governmental interest. *Williams v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955); *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 368, 489 N.E. 2d 1374 (1986).

While testing both of the Petitioner's challenges against the appropriate standard, the Supreme Court of Illinois had no difficulty in determining that Section 2-622 serves a necessary, legitimate governmental interest. As the court noted, "the statute is intended to reduce the number of frivolous actions that may otherwise be filed. By requiring litigants to obtain, at an early point, the opinion of an expert who agrees that a meritorious cause of action exists, the statute will help ensure that only claims with some merit are presented." *Deluna* at 75.

II.

SECTION 5/2-622 OF THE ILLINOIS CODE OF CIVIL PROCEDURE IS CONSTITUTIONAL AS IT IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST.

As the Supreme Court of Illinois clarified in *Bernier*, the rational basis standard must be utilized to test the constitutionality of medical malpractice legislation under guarantees of due process and equal protection. The standard is whether the provisions bear a rational relationship to a legitimate governmental interest. *Bernier*, 113 Ill. 2d at 228. Illinois courts have consistently found Section 5/2-622 to be rationally related to a legitimate, important purpose of the legislature, that is elimination of frivolous lawsuits at their initiation phase. *Lyon v. Hasbro Industries, Inc.*, 156 Ill. App.

3d 649, 509 N.E. 2d 702 (4th Dist. 1987). This specific section of the Illinois Code of Civil Procedure was contained as a portion of the medical malpractice reform legislation enacted by the General Assembly in 1985 in response to a perceived crisis in the field of medical malpractice. *Bernier,* 113 Ill. 2d at 252.

Petitioner herein has the burden to establish the statute's invalidity, otherwise it is presumed to be valid. *Pre-School Owners Association of Illinois, Inc. v. Department of Children & Family Services,* 119 Ill. 2d 268, 518 N.E. 2d 1018 (1988). The Petitioner has provided this Honorable Court with no relevant, pertinent, prior decisions to enable this Court to have a necessity to review the constitutionality of this specific section of the Illinois Code of Civil Procedure, 5/2-622. Thus, this Court should deny Petitioner's request for Writ of Certiorari to issue.

CONCLUSION

For the foregoing reasons, the Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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